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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

BROOKE STJERNE et al., Plaintiffs and Appellants, v. ELDORADO POLO CLUB et al., Defendants and Respondents.	E069091 (Super.Ct.No. PSC1505835) OPINION

APPEAL from the Superior Court of Riverside County. Gloria Trask, Judge. Affirmed in part; reversed in part.

Kasdan Lippsmith Weber Turner, Graham B. LippSmith and Jaclyn L. Anderson for Plaintiffs and Appellants.

Daley & Heft, Lee H. Roistacher, Robert H. Quayle IV and Kristina M. Pfeifer for Defendants and Respondents.

In a third amended complaint (TAC), Brooke Stjerne (Mother), Kyle Stjerne (Father), and Danica Stejerne (the victim) sued Eldorado Polo Club (Eldorado), Desert Polo Land Company, LLC (Desert Polo), and others for negligence and premises liability. Mother and Father sued Eldorado, Desert Polo, and others for negligent infliction of emotional distress.

The trial court granted Eldorado's motion for summary adjudication as to Mother's and Father's claims for negligence and premises liability because Mother and Father conceded their claims were not viable. The trial court granted Eldorado's motion for summary adjudication as to the negligent infliction of emotional distress cause of action because Mother and Father did not witness the victim being injured.

The trial court granted Desert Polo's motion for summary adjudication as to the negligent infliction of emotional distress cause of action. The trial court granted Desert Polo's motion for summary judgment as to the negligence and premises liability causes of action.

Mother and Father contend the trial court erred by dismissing their negligent infliction of emotional distress cause of action. Mother, Father, and the victim (collectively, the Family) contend the trial court erred by granting Desert Polo's motion for summary judgment on the negligence and premises liability causes of action. We affirm the grant of summary adjudication, but reverse the grant of summary judgment.

FACTUAL AND PROCEDURAL HISTORY

A. THIRD AMENDED COMPLAINT

In March 2015, the victim was 19 months old. Desert Polo owned, maintained, operated, controlled, and supervised a polo field in Indio (the field). Eldorado maintained, operated, controlled, and supervised the field. A " 'safety zone' ran parallel to the length of the field merely 10 yards from the playing field and was delineated in part by signs that provided, 'FOR YOUR SAFETY STAY BEHIND THE WHITE LINE.' " There were 11-inch high sideboards along the field.

A picnic area was located beyond the "safety zone" signs—approximately 20 to 25 yards from the field's sidelines. The area included tables with seats facing away from the polo matches. Cars were permitted to park near the picnic area, which allowed for tailgating.

On March 29, 2015, the Family was at the field's picnic area while a polo match was taking place. Charles Petersen (Petersen) was playing in the polo match. In the final seconds of the match, Petersen's team was ahead by one point. In those final seconds, Petersen struck the polo ball, sending it flying into the picnic area. The ball struck the victim's head. The victim "suffered and continues to suffer from . . . severe brain injuries, including bleeding on her brain."

B. ELDORADO

1. *MOTION FOR SUMMARY ADJUDICATION*

Eldorado moved for summary adjudication. Eldorado asserted Mother's and Father's claims for negligence and premises liability lacked merit because Mother and

Father were bystanders and were only claiming emotional distress damages. Eldorado asserted Mother's and Father's claims for negligent infliction of emotional distress failed because Mother and Father did not witness the victim being struck by the polo ball.

Eldorado provided a partial transcript of Mother's deposition. Mother estimated she was "[l]ess than 15 feet" away from the victim when the victim was struck by the ball. Prior to the victim being struck, the victim was playing, and Mother "was sitting under the pop-up." The following exchange occurred during the deposition:

"[Attorney:] Did you actually observe her getting hit by the ball?

"[Mother:] No.

"[Attorney:] When did you first become aware that she was hit by the ball?

"[Mother:] I heard her screaming, and she was laying on the grass.

"[Attorney:] So her crying got your attention, and then when you looked at her, she was on the grass?

"[Mother:] Yes.

"[Attorney:] What happened next?

"[Mother:] I ran over to her, and she was surrounded by people. And I asked if she had just fallen or gotten pushed over or if the ball had actually hit her, and a couple of the people said that she had been hit by the ball. I asked where, and they said her head."

Eldorado provided a partial transcript of Father's deposition. Father estimated the victim was 10 feet away from him when she was struck. Father was facing the victim. The following exchange occurred during the deposition:

"[Attorney:] Did you see [the victim] get hit by the ball?

"[Father:] No, I did not.

"[Attorney:] Do you know what you were doing when [the victim] got hit by the ball?

"[Father:] At that point in time, I was encouraging my son to try to play catch with me. . . . He wasn't interested. . . . My attention was drawn back towards the field based on just what I observed the other spectators doing. That is when the ball flew by me, almost hitting me. By the time that happened, I moved out of the way of the ball to avoid getting hit. [The victim] was on the ground, screaming.

"[Attorney:] So you saw—did you actually see the ball get hit?

"[Father:] No.

"[Attorney:] But you did see it coming in your direction?

"[Father:] After, again, I observed people standing up looking in my direction, I looked back towards the field, I instinctually moved out of the way when I saw something coming directly at me. I assumed, then, that is the ball traveling past me. As it went past me, it struck my daughter in the head. She is then screaming and crying on the ground, so I attended to her.

"[Attorney:] Were you the first person to reach [the victim] after she was struck by the ball?

"[Father:] I believe there were—there was another adult who got to her right before I did, but I believe, of our party, I was the first one to get to her. [¶] . . . [¶]

"[Attorney:] So what happened after [the victim] was hit by the ball and you had gone to her?

"[Father:] I was trying to assess exactly what had happened. That's when someone informed us that the ball had hit her on the head. My immediate concern was for her health and safety. You know, I tried to determine if she was bleeding, what the extent of any kind of injury was, and she was just hysterical. I was just trying to get information as to what had took [*sic*] place."

2. OPPOSITION

Mother and Father opposed Eldorado's motion. Mother and Father asserted they did not intend to bring claims for negligence and premises liability on their own behalves; rather, the two causes of action were brought on behalf of the victim. Mother and Father explained the Family's case as follows: (1) the first cause of action, for negligence, was by the victim against all remaining defendants; (2) the second cause of action, for premises liability, was by the victim against all remaining defendants; and (3) the third cause of action, for negligent infliction of emotional distress, was by Mother and Father against all remaining defendants.

As to the negligent infliction of emotional distress cause of action, Mother and Father asserted their claim had merit because they heard the victim crying immediately upon being struck and ran over to her. Mother and Father asserted they did not have to witness the ball striking the victim in order to have a valid claim.

3. HEARING

The trial court held a hearing on Eldorado's motion. In regard to negligent infliction of emotional distress, Mother and Father said the law provided, " 'A plaintiff may recover for the injury perceived by other senses so long as the event is contemporaneously understood as causing injury to a close relative.' " The trial court responded, "That's the problem that we have here. For [Father], he knew that a polo ball flew by him, and he saw his daughter screaming and crying on the ground, but he did not appreciate that it was the polo ball that had hit his daughter, so he was not contemporaneously aware of the event causing injury to his daughter . . . , and he didn't discover the cause of her injuries until after the accident occurred. And so that's what I base it on as to [Father]. As to [Mother], she didn't see the event, that is she didn't see the ball hitting [the victim], and there's no evidence on that fact."

Mother and Father asserted that the law does not require a plaintiff to have visually witnessed the impact in order to sue for negligent infliction of emotional distress. Mother and Father contended that their proximity to the victim at the time of the impact was sufficient for negligent infliction of emotional distress. The trial court said, "[M]other hears her daughter screaming, but she didn't know the reason until she discovers it later. That's not contemporaneous." The trial court granted Eldorado's motion for summary adjudication as to Mother's and Father's claims for negligence, premises liability, and negligent infliction of emotional distress.

C. DESERT POLO

1. *MOTION*

Desert Polo moved for summary judgment, or, alternatively, summary adjudication. Desert Polo asserted "it leased an empty field and club house to Eldorado . . . . [Desert Polo's] ownership of the premises does not subject it to liability because [the Family] allege[s] that they were injured as a result of polo operations that were conducted by others on the leased premises, not any defect in the premises." (Boldface omitted.) Desert Polo contended it "had no role in the control over or supervision of the Eldorado Polo Club polo field, spectator areas, parking areas, tailgating areas, tents, sidelines, barriers, or signage for polo matches, including the match in which [the Family] allege[s] [the victim was] injured." Desert Polo provided a copy of Eldorado's lease.

Desert Polo further argued that Mother's and Father's negligent infliction of emotional distress claims failed "because they did not see the ball hit [the victim] and therefore [they] lack the required contemporaneous sensory impression of the injury-causing event." Desert Polo contended that being in proximity of the victim and seeing the victim after the impact were insufficient for negligent infliction of emotional distress. Desert Polo provided a portion of Father's deposition transcript, including the portion quoted *ante*. Desert Polo also provided a portion of Mother's deposition transcript, including the portion quoted *ante*.

2. *OPPOSITION*

The Family opposed Desert Polo's motion. The Family asserted that "even during the Polo Season, Desert Polo ha[d] 'the right to enter into [the] Premises at any time, in the case of an emergency, and otherwise at reasonable times after reasonable notice, for the purpose of inspecting the condition of the Premises.' " The Family contended that Desert Polo also retained the right to relocate, modify, and remodel any improvements at the field. The Family asserted Desert Polo was obligated to maintain its property in a reasonably safe condition and to inspect its property. The Family asserted Desert Polo "could have exercised its rights under the Lease to address the false safety zone."

In regard to negligent infliction of emotional distress, Mother and Father asserted they "were present at the scene of the incident and had sensory awareness of [the victim's] injuries," and therefore were "entitled to assert their claims" for negligent infliction of emotional distress.

3. *REPLY*

Desert Polo filed a reply to the Family's opposition. Desert Polo asserted it leased empty land to Eldorado, and the Family failed to allege a dangerous condition on the property that existed prior to the lease. Desert Polo contended it had no duty to inspect the field after leasing it to Eldorado. Desert Polo asserted its right to enter the field for inspections did not create a duty that it inspect the field.

In regard to negligent infliction of emotional distress, Desert Polo conceded that Mother and Father did not have to see the impact. However, Desert Polo argued that being near the incident without contemporaneously perceiving the impact was insufficient. Desert Polo contended Mother and Father had to contemporaneously perceive the victim being hurt in order have a valid claim for negligent infliction of emotional distress.

4. *HEARING*

The trial court held two hearings on Desert Polo's motion. At the first hearing, the trial court explained that Mother and Father did not have a contemporaneous perception of the victim sustaining her injury, and therefore, their claims for negligent infliction of emotional distress failed. The trial court granted summary adjudication on Mother's and Father's claims for negligent infliction of emotional distress.

The second hearing concerned the issue of negligence/premises liability. The Family contended, "The Courts have come to the conclusion that a landlord who has actual knowledge of a dangerous condition on his property should be . . . held to owe a duty of care only when he has the right to prevent the presence of the dangerous condition on the premises." The trial court responded, "So that's exactly the problem, actual knowledge. . . . There is no actual knowledge. This was a lessor of unimproved real estate." The trial court granted summary judgment in favor of Desert Polo.

DISCUSSION

A. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

1. *CONTENTION*

Mother and Father contend the trial court erred by granting summary adjudication in favor of Eldorado and Desert Polo on their claims of negligent infliction of emotional distress.

2. *STANDARD OF REVIEW*

"Because this matter reaches us after summary adjudication, we review the motion de novo. [Citation.] We review the facts presented to the trial court and independently determine their effect as a matter of law." (*Transamerica Ins. Co. v. Superior Court* (1994) 29 Cal.App.4th 1705, 1713-1714.)

3. *LAW*

"Negligent infliction of emotional distress is a form of the tort of negligence, to which the elements of duty, breach of duty, causation and damages apply. The existence of a duty is a question of law. [Citation.] 'The distinction between the "bystander" and the "direct victim" cases is found in the source of the duty owed by the defendant to the plaintiff.' [Citation.] 'Bystander' claims are typically based on breach of a duty owed to the public in general [citation], whereas a right to recover for emotional distress as a 'direct victim' arises from the breach of a duty that is assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of the defendant's preexisting relationship with the plaintiff." (*Huggins v. Long Drug Stores California, Inc.* (1993) 6 Cal.4th 124, 129.)

"The [high] court first recognized the right to recover damages based on a bystander observing another person being injured in [*Dillon v. Legg* (1968) 68 Cal.2d 728 (*Dillon*)]. The court explained that the following factors need to be considered to assess foreseeability: '(1) Whether [the] plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon [the] plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether [the] plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.' " (*Moon v. Guardian Postacute Services, Inc.* (2002) 95 Cal.App.4th 1005, 1009.)

In *Thing v. La Chusa* (1989) 48 Cal.3d 644, 647-648 (*Thing*), a minor was struck by an automobile while his mother "was nearby, but neither saw nor heard the accident. She became aware of the injury to her son when told by a daughter that [her son] had been struck by a car. She rushed to the scene where she saw her bloody and unconscious child, who she believed was dead, lying in the roadway." The mother sued the defendants for negligent infliction of emotional distress. (*Id.* at p. 648.)

The trial court granted the defendants' motion for summary judgment because the mother's claim for negligent infliction of emotional distress failed due to the mother not contemporaneously and sensorily perceiving the accident. (*Thing*, *supra*, 48 Cal.3d at p. 648.) The court of appeal reversed, reasoning that "contemporaneous awareness of

a sudden occurrence causing injury to her child was not a prerequisite to recovery under *Dillon*." (*Ibid.*)

The Supreme Court explained that the point of the three *Dillon* factors was to evaluate the degree of foreseeability. (*Thing*, *supra*, 48 Cal.3d at p. 655.) The Supreme Court disagreed with the court of appeal, concluding that a required factor for a bystander case is that the bystander "is present at the scene of the injury producing event at the time it occurs and is then aware that it is causing injury to the victim." (*Id.* at p. 667-668, fn. omitted.) The majority of the high court wrote, "While not forthrightly acknowledging the inescapable necessity of limits that will in some cases seem arbitrary, the dissent . . . itself suggests a different, but no less arbitrary, limit—that the plaintiff may recover if he or she witnesses the 'immediate' consequences of the third party injury (Why stop there? Is that a less arbitrary line?)" (*Id.* at p. 668, fn. 11.)

The majority wrote, "The undisputed facts establish that plaintiff was not present at the scene of the accident in which her son was injured. She did not observe defendant's conduct and was not aware that her son was being injured. She could not, therefore, establish a right to recover for the emotional distress she suffered when she subsequently learned of the accident and observed its consequences." (*Thing*, *supra*, 48 Cal.3d at p. 669.) The high court concluded the trial court properly granted summary judgment. (*Ibid.*)

Since *Thing*, the Supreme Court has held the line for foreseeability at bystanders contemporaneously sensing the injury causing event. In 2002, the Supreme Court wrote, "One takes a giant leap . . . by imposing liability for [negligent infliction of

emotional distress] based on nothing more than a bystander's 'observation of *the results* of the defendant's infliction of harm,' however 'direct and contemporaneous.' " (*Bird v. Saenz* (2002) 28 Cal.4th 910, 921.)

4. *ANALYSIS*

Mother and Father testified that they were not aware the victim was struck by the polo ball until after the impact occurred. Mother and Father testified that they had to be told, after the impact, that the ball struck the victim in order to understand why the victim was crying. Mother asked others if the victim "had just fallen or gotten pushed over or if the ball had actually hit her." When the victim cried, Father went over to the victim "to assess exactly what had happened. That's when someone informed [Mother and Father] that the ball had hit her on the head." In the TAC, the Family alleged Mother and Father heard the victim scream, and "[a] few minutes later, they also personally experienced the panic of watching the right side of [the victim's] body go limp."

Because Mother and Father did not have a contemporaneous awareness of the ball's impact on the victim, their claim for negligent infliction of emotional distress fails. Awareness of the results of the impact is insufficient for liability. (*Thing*, *supra*, 48 Cal.3d at p. 669.) The trial court did not err by granting summary adjudication in favor of Eldorado and Desert Polo on Mother's and Father's cause of action for negligent infliction of emotional distress.

Mother and Father rely on *Wilks v. Hom* (1992) 2 Cal.App.4th 1264 to support their assertion that the trial court erred. In *Wilks*, a mother and her three daughters were

at home. The mother was vacuuming in the living room along with one daughter, Janelle. Mother's other two daughters, Jessica and Virginia, were in their respective bedrooms. (*Id.* at p. 1267.) The mother called to Virginia to unplug the vacuum. As Virginia unplugged the vacuum, there was an explosion. The mother and Janelle were blown out of the house. The mother tried to reenter the house but was repelled by the heat. She went to the side of the house and pulled Virginia and Jessica outside. (*Ibid.*) "Virginia died of her injuries several hours later. Jessica survived but was severely burned." (*Ibid.*)

The appellate court considered whether the trial court erred in instructing the jury on liability to a bystander who observes another person being injured. (*Wilks v. Hom*, *supra*, 2 Cal.App.4th at p. 1268.) The trial court's instruction "required that the [mother] be 'present at the scene of the accident at the time it occurred' and be 'aware that such accident caused the injury to Jessica.' Notable [was] the omission of a requirement that the [mother] actually 'witness' the injury to Jessica as and when it occurred." (*Id.* at p. 1272.)

The appellate court wrote, "[W]e conclude it is not necessary that a plaintiff bystander actually have witnessed the infliction of injury to her child, provided that the plaintiff was at the scene of the accident and was sensorially aware, in some important way, of the accident and the necessarily inflicted injury to her child. Here, although [the mother] could not visually witness the infliction of injuries to Jessica, she was most evidently present at the scene of the accident, was personally impressed by the

explosion at the same instant damage was done to her child, and instantly knew of the likely severe damage to the child." (*Wilks v. Hom*, *supra*, 2 Cal.App.4th at p. 1268.)

The instant case differs from *Wilks*. In *Wilks*, the mother knew her children were in a house that just exploded. The mother personally experienced the explosion at the same instant as her children. The mother did not need to ask another person what occurred or be told by another person what happened to her children. The mother knew her children were injured from her first-hand experience of the explosion. In the instant case, Mother and Father had to be told by another person what happened to the victim. Mother and Father did not personally experience the ball striking the victim. Rather, Mother and Father were quickly aware of the results of the ball impacting the victim. Accordingly, because Mother and Father did not contemporaneously sense the ball impacting the victim, we conclude the trial court did not err.

B. NEGLIGENCE AND PREMISES LIABILITY

1. *CONTENTION*

The Family contends the trial court erred by granting summary judgment in favor of Desert Polo on the negligence and premises liability causes of action.

2. *STANDARD OF REVIEW*

"Review of a summary judgment motion by an appellate court involves application of the same three-step process required of the trial court. [Citation.] 'First, we identify the issues framed by the pleadings since it is these allegations to which the motion must respond by establishing a complete defense or otherwise showing there is no factual basis for relief on any theory reasonably contemplated by the opponent's

pleading. [Citations.] [¶] Secondly, we determine whether the moving party's showing has established facts which negate the opponent's claim and justify a judgment in [the] movant's favor. [Citations.] . . . [¶] When a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of [a] triable, material factual issue.' " (*Hansra v. Superior Court* (1992) 7 Cal.App.4th 630, 638.)

3. *LAW*

"The elements of a negligence claim and a premises liability claim are the same: a legal duty of care, breach of that duty, and proximate cause resulting in injury. [Citations.] Premises liability ' "is grounded in the possession of the premises and the attendant right to control and manage the premises" '; accordingly, " 'mere possession with its attendant right to control conditions on the premises is a sufficient basis for the imposition of an affirmative duty to act." ' [Citation.] But the duty arising from possession and control of property is adherence to the same standard of care that applies in negligence cases." (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1158.)

Civil Code section 1714, subdivision (a), provides, "Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property . . . " " 'A lessor who leases property for a purpose involving the admission of the public is under a duty to see that it is safe for the purposes intended, and to exercise reasonable care to inspect and repair the premises before possession is transferred so as

to prevent any unreasonable risk of harm to the public who may enter.' " (*Portillo v. Aiassa* (1994) 27 Cal.App.4th 1128, 1134 (*Portillo*).)

"Where there is a duty to exercise reasonable care in the inspection of premises for dangerous conditions, the lack of awareness of the dangerous condition does not generally preclude liability. [Citation.] 'Although liability might easily be found where the landowner has actual knowledge of the dangerous condition "[t]he landowner's lack of knowledge of the dangerous condition is not a defense. He has an *affirmative duty* to exercise ordinary care to keep the premises in a reasonably safe condition, and therefore must inspect them or take other proper means to ascertain their condition. And if, by the exercise of reasonable care, he would have discovered the dangerous condition, he is liable." ' " (*Portillo, supra,* 27 Cal.App.4th at p. 1134.)

"Frequently, situations arise where injury results from [an] activity of the lessee upon premises which, by reason of some defect, are not reasonably suitable for such conduct. When this occurs, the lessor may be held liable, not for the fault of the lessee, but only for his own fault in renting property not safe for the activity to be conducted. A recent example of this type of situation involved liability of the owner of a fairgrounds for injuries suffered by a spectator at a 'hot rod' race being conducted by its licensee. [Citation.] The petition alleged that the barriers and guards upon the premises were unsuitable for such purposes and that the plaintiff was injured by a wheel which became detached from one of the racing cars. The appellate court reversed an order sustaining a motion to dismiss the petition. It agreed that the landlord could not be

liable for negligence in the operation of the race, but held that the corporation owed a duty to see that the premises were reasonably suited to the activity to be conducted.

"In *Larson v. Calder's Park Co.*, 54 Utah 325, the plaintiff was injured by a bullet from a shooting gallery. The evidence disclosed that the walls of the rented building in which the business was conducted were dilapidated and contained large holes and cracks through which bullets could escape. This condition existed at the time of the lease. The lessor was held liable for the defective condition of the walls which rendered the building unsafe for the operation of a shooting gallery. Here, again, liability was predicated upon the condition of the property leased, not the fault of the lessee in operating the property." (*Goodman v. Harris* (1953) 40 Cal.2d 254, 264-265.)

4. *TAC*

In the introductory "parties" section of the TAC, the Family wrote, "[The Family] hereinafter collectively refer[s] to Eldorado, Goldenvoice, Desert Polo, and Defendant Does 2 through 20 as 'Eldorado Defendants' or 'Eldorado.'" In other words, the Family bundled together its allegations against Eldorado and Desert Polo as though the two defendants were one.

In its factual allegations, the Family alleged (1) "Eldorado was aware of the risk that a polo ball could fly into its social gathering and spectator areas" because "Eldorado's Polo Manager witnessed polo balls cross the sidelines 'all the time' "; (2) despite its knowledge of errant polo balls, "Eldorado established, designed, set up, and managed its public parking and picnicking areas in a manner that encouraged socializing, rather than polo spectating, creating major risks to social guests who, like

[the Family], had no clue that they were at risk for any injuries"; (3) Eldorado failed to post warning signs; (4) Eldorado created "an insufficient 'safety zone' that was far too close to the playing field"; and (5) Eldorado failed to erect any nets or other barriers that would stop an errant polo ball from striking bystanders.

Within the premises liability cause of action, the Family alleges, "The Eldorado Defendants breached their duty to own, rent, lease, manage, supervise, operate, secure, maintain, inspect, repair, design and control the Subject Premises so as to minimize the risks of harm to spectators, social guests, and invitees such as [the Family]."

5. *ANALYSIS: ALLEGATIONS*

a. Factual Allegations

One of the problems in this case is that the Family did a poor job of pleading the facts relevant to Desert Polo. The Family mixed together the factual allegations for Desert Polo and Eldorado, and primarily focused on the facts that are relevant to Eldorado, as the operator of the field. For example, the Family's factual allegations primarily focus on the condition of the field on the date of the incident. The Family alleges the safety zone was inadequate on the date of the incident. Those allegations are more relevant to Eldorado than Desert Polo. (See generally *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1162 [operators have a duty not to unreasonably increase the inherent risks of harm in a sport].)

The Family does not provide factual allegations concerning the condition of the field at the time it was leased in 2013; what Desert Polo knew at the time of the lease in 2013; or what inspections, if any, were conducted by Desert Polo. In other words, there

are few factual allegations concerning what acts or omissions were made by Desert Polo.

b. Legal Allegations

The Family does make legal allegations that are relevant to Desert Polo. In particular, the Family alleges Desert Polo breached its duty in owning, leasing, inspecting, and repairing the field. Although the allegations are minimal, they can be understood as alleging that Desert Polo (1) was negligent in assessing whether the field was suitable for polo matches; (2) failed to exercise reasonable care in inspecting the field prior to leasing it to Eldorado; and/or (3) failed to exercise reasonable care in making repairs to the field prior to leasing it to Eldorado. (See generally *Youngman v. Nevada Irr. Dist.* (1969) 70 Cal.2d 240, 245 [a complaint should "acquaint a defendant with the nature, source and extent of [the] cause of action"]; also see generally *Okun v. Superior Court* (1981) 29 Cal.3d 442, 458 [pleading should give "notice of the issues sufficient to enable preparation of a defense"].)

6. *ANALYSIS: DESERT POLO'S MOTION*

a. Evidence

The evidence provided by Desert Polo in support of its motion includes: (1) Eldorado's lease, dated May 31, 2013,[1] with a lease term of seven years; (2) two

[1] The Family's original complaint was filed on December 17, 2015. The statute of limitations for negligence is two years. (Code Civ. Proc., § 335.1.) We are unable to locate a copy of Desert Polo's answer in the record. As a result, it is unclear if Desert Polo pled a statute of limitations defense. (*Petersen v. W.T. Grant Co.* (1974) 41

[footnote continued on next page]

photographs of the field; (3) a diagram of the field on the date of the incident; (4) a partial deposition transcript of Debbie Morrison who authenticated a photograph from the day before or after the incident; (5) the declaration of attorney Ladell Hulet Muhlestein, who asserted various exhibits were true and correct copies; (6) a partial transcript of Father's deposition; (7) a partial transcript of Mother's deposition; (8) a partial transcript of the deposition of James Joseph A'Court, who is Eldorado's marketing and events director, and who described Eldorado's polo schedule, game attendance, and lack of interaction with Desert Polo; (9) Father's responses to Desert Polo's special interrogatories; (10) Mother's responses to Desert Polo's special interrogatories; (11) Petersen's March 2, 2016, request for judicial notice in support of his demurrer, reflecting polo is an active sport involving striking a ball with mallets toward the opposing team's goal; (12) a reporter's transcript of the hearing on Petersen's demurrer, in which the court granted the request for judicial notice; (13) Petersen's May 19, 2016, request for judicial notice in support of his demurrer; (14) the trial court's tentative ruling on Petersen's demurrer and ruling on his request for judicial notice; and (15) the trial court's ruling on Petersen's demurrer.

Another item of evidence provided by Desert Polo was the declaration of James Paige (Paige), "an authorized representative of Desert Polo." Paige asserted the exhibits were true and correct copies. Paige also declared that Eldorado "is solely responsible for maintenance of the premises, in accordance with the lease." Paige explained that

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Cal.App.3d 217, 220 ["the statute of limitations . . . must be affirmatively evoked in the lower court by appropriate pleading or it is waived"].)

Eldorado "is exclusively responsible for polo operations on the property, and Desert Polo Land is exclusively responsible for [the] operation of music festivals on the property, in accordance with the lease." Paige declared, "Desert Polo Land has no role in connection with polo events held on the leased premises, including the polo match in which plaintiffs allege they were injured. Desert Polo Land is merely the lessor of an empty field and club house to Eldorado Polo Club."

b. Analysis

Desert Polo's evidence goes toward defeating the factual allegations, which are more relevant to the Family's cause of action against Eldorado. For example, Desert Polo provides evidence that it did not control the placement of warning signs on the date of the injury. That evidence provides little insight into what Desert Polo knew when it leased the field to Eldorado. (*Portillo*, *supra*, 27 Cal.App.4th at p. 1134 [" ' "A lessor who leases property involving the admission of the public is under a duty to see that it is safe for the purposes intended, and to exercise reasonable care to inspect and repair the premises before possession is transferred" ' "].) While addressing the factual allegations, Desert Polo's evidence fails to address the legal allegations that it was negligent.

Because Desert Polo's evidence does not address the legal allegations, Desert Polo has failed to demonstrate that it was not negligent. For example, Desert Polo has not provided evidence showing (1) what it knew about the field's suitability for polo matches at the time of leasing the field; (2) what inspections, if any, it conducted; and (3) what repairs, if any, it made to the field. Due to Desert Polo's failure to provide

evidence reflecting it was not negligent in leasing, inspecting, and repairing the field, we must conclude the trial court erred in granting summary judgment on the negligence and premises liability causes of action.

At oral argument in this court, Desert Polo asserted that liability for its leasing activity was not argued in the trial court and therefore cannot be a basis for reversing the judgment. On summary judgment the moving party "bears the burden of furnishing supporting documents that establish that the claims of the adverse party are entirely without merit on any legal theory." (*Lipson v. Superior Court* (1982) 31 Cal.3d 362, 374.) As set forth *ante*, in the TAC, the Family alleged, "The Eldorado Defendants breached their duty to own, rent, lease, . . . the Subject Premises so as to minimize the risk of harm to spectators, social guests, and invitees such as Plaintiffs." Fault in leasing was explicitly alleged in the TAC. If, as Desert Polo asserts, leasing was not addressed in Desert Polo's motion for summary judgment, then the trial court erred by granting summary judgment because Desert Polo failed to "establish that the claims of the adverse party are entirely without merit on any legal theory," given that liability based upon leasing was explicitly alleged in the TAC. (*Id.* at p. 374.)

Desert Polo contends the trial court properly granted summary judgment because Desert Polo had no duty to protect the victim from being struck by a polo ball. Desert Polo's argument is again directed at the factual allegations that are more relevant to the claim against Eldorado. If Desert Polo is found to be liable in this case, it will be for (1) Desert Polo's decision to lease the field for the purpose of polo matches that are open to the public, when it knew the field was not reasonably suited to that use;

(2) Desert Polo's failure to exercise reasonable care in inspecting the field prior to leasing it; (3) Desert Polo's failure to exercise reasonable care in repairing the field prior to leasing it; and/or (4) Desert Polo's decision to ignore a dangerous condition on the property, after the property was leased, when Desert Polo was aware of the dangerous condition. (*Portillo, supra*, 27 Cal.App.4th at p. 1134 [" ' "A lessor who leases property involving the admission of the public is under a duty to see that it is safe for the purposes intended, and to exercise reasonable care to inspect and repair the premises before possession is transferred" ' "]; *Martinez v. Bank of America Nat. Trust & Sav. Assn.* (2000) 82 Cal.App.4th 883, 892 [landlord who knows of dangerous condition and has the right to cure the condition has a duty to cure it].)

Desert Polo contends the trial court properly granted summary judgment because the Family's claim is barred by primary assumption of the risk. Primary assumption of the risk operates to eliminate or limit the duty of care owed by the defendant due to the nature of the sport and the defendant's relationship to the sport. (*Knight v. Jewett* (1992) 3 Cal.4th 296, 316-317.) For example, if a baseball spectator is injured by a carelessly thrown bat at a baseball game, under the primary assumption of the risk doctrine the player would not have a duty toward the spectator because imposing a duty of care could chill the player's vigorous participation in the game; however, the stadium operator could be liable due to its failure to provide protection from flying bats. (*Id.* at p. 317.)

In the instant case, primary assumption of the risk will not resolve the issue of duty. As explained *ante*, Desert Polo had the duties to (1) not lease the field if it were

unsuitable for polo matches; (2) to exercise reasonable care in inspecting the field prior to leasing it; (3) to exercise reasonable care in repairing the field prior to leasing it; and (4) to repair any problems at the field that Desert Polo became aware of after leasing the field. The primary assumption of the risk doctrine is relevant to defendants who have a role to play in sporting activities. The doctrine does not cancel out Desert Polo's various duties that existed in leasing the field to Eldorado in 2013 because leasing the field is not a sporting activity. It is possible Desert Polo could argue secondary assumption of the risk, which involves application of the doctrine of comparative fault (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003); however, we are not persuaded that primary assumption of the risk results in Desert Polo not having a duty of care in this case.

The trial court granted the motion for summary judgment after finding Desert Polo had no knowledge of a dangerous condition at the field because Desert Polo "was a lessor of unimproved real estate." We infer that the trial court's finding is based upon Paige's declaration that "Desert Polo Land is merely the lessor of an empty field and club house to Eldorado Polo Club." We disagree with the trial court's interpretation that the parcel was unimproved because Paige declared there was a club house on the property. Therefore, exactly what is meant by "an empty field" is unclear. Did it not have sideboards? Did it not have "safety zone" signs? Did it not have goals? Desert Polo has failed to provide evidence concerning the condition of the field at the time it was leased to Eldorado in 2013. Due to the lack of evidence concerning Desert Polo's

leasing, inspecting, and repairing of the field, we conclude the trial court erred by granting summary judgment.

DISPOSITION

The summary adjudication of the negligent infliction of emotional distress cause of action is affirmed as to Eldorado and Desert Polo. The summary judgment of the negligence and premises liability causes of action is reversed as to Desert Polo. Eldorado is awarded its costs on the Eldorado portion of the appeal. (Cal. Rules of Court, rule 8.278(a)(1).) The parties are to bear their own costs on the Desert Polo portion of the appeal. (Cal. Rules of Court, rule 8.278(a)(3).)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

McKINSTER
Acting P. J.

RAPHAEL
J.